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UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA

19 DENNIS HART AND RON MILLER,  
 20 Plaintiffs,  
 21 v.  
 22 CITY OF ALAMEDA,  
 23 Defendant.

Case No.: C 07-05845 MMC

**ANSWER TO FIRST AMENDED  
 COMPLAINT FOR VIOLATION  
 OF THE FAIR LABOR STANDARDS  
 ACT**

22 In answer to the First Amended Complaint (the "Complaint"), Defendant City of  
 23 Alameda admits, denies, and affirmatively alleges as follows:

- 24 1. Defendant admits the allegations in paragraph 1 of the Complaint.
- 25 2. In answer to paragraph 2 of the Complaint, Defendant affirmatively alleges that it  
 26 is a charter city and municipal corporation and on that basis denies that it was organized and  
 27 operating under the laws of the State of California.
- 28 3. In answer to paragraph 3 of the Complaint, Defendant admits jurisdiction of this

1 action. Except as specifically admitted, Defendant lacks information and belief sufficient to  
2 answer the allegations, and on that basis, denies each and every allegation contained therein.

3 4. Defendant admits the allegations of paragraph 4 of the Complaint.

4 5. In answer to paragraph 5 of the Complaint, Defendant lacks information or belief  
5 sufficient to answer the allegations, and on that basis, denies each and every allegation contained  
6 therein. The allegations are legal conclusions.

7 6. In answer to paragraph 6 of the Complaint, Defendant lacks information or belief  
8 sufficient to answer the allegations, and on that basis, denies each and every allegation contained  
9 therein. The allegations are legal conclusions.

10 7. In answer to paragraph 7 of the Complaint, Defendant admits the Alameda Police  
11 Officers Association is a duly recognized employee organization. Defendant further admits that  
12 the Alameda Police Officers Association is the exclusive recognized bargaining agent for both  
13 the sworn police unit and the non-sworn unit. Except as specifically admitted, Defendant lacks  
14 information or belief sufficient to answer the allegation that Plaintiffs were members at all  
15 material times. Except as specifically admitted or specifically denied on lack of information or  
16 belief, Defendant denies each and every allegation contained therein. The allegations are legal  
17 conclusions.

18 8. In answer to paragraph 8 of the Complaint, Defendant admits that a memorandum  
19 exists entitled "Memorandum of Understanding between City of Alameda and Alameda Police  
20 Officers Association Non-Sworn Unit" dated December 24, 2006-December 19, 2009, and a  
21 memorandum exists entitled "Memorandum of Understanding between City of Alameda and  
22 Alameda Police Officers Association" dated January 1, 2000-January 5, 2008. Except as  
23 specifically admitted, Defendant denies each and every allegation contained therein. Defendant  
24 affirmatively alleges that each document speaks for itself. The allegations are legal conclusions.

25 9. In answer to paragraph 9 of the Complaint, Defendant lacks information or belief  
26 sufficient to answer the allegations, and on that basis, denies each and every allegation contained  
27 therein. Defendant affirmatively alleges that class actions cannot be maintained in FLSA  
28 actions.

10. In answer to paragraph 10 of the Complaint, Defendant denies the allegation that it did not avail itself of the benefits of any other work period permitted for public safety employees. Defendant affirmatively alleges that the Memoranda of Understanding are in writing and speak for themselves. Defendant lacks information or belief sufficient to answer the remaining allegations, and on that basis, denies each and every remaining allegation contained therein.

11. In answer to paragraph 11 of the Complaint, Defendant admits that a memorandum exists entitled "Memorandum of Understanding between City of Alameda and Alameda Police Officers Association Non-Sworn Unit" dated December 24, 2006-December 19, 2009, and a memorandum exists entitled "Memorandum of Understanding between City of Alameda and Alameda Police Officers Association" dated January 1, 2000-January 5, 2008. Except as specifically admitted, Defendant denies each and every allegation contained therein. Defendant affirmatively alleges the Memoranda of Understanding are in writing and speak for themselves.

12. Defendant denies the allegations in paragraph 12 of the Complaint.

13. In answer to paragraph 13 of the Complaint, Defendant incorporates by reference its answers to paragraphs 1-12, as though fully set forth herein.

14. Defendant denies the allegations in paragraph 14 of the Complaint.

15. In answer to paragraph 15 of the Complaint, Defendant incorporates by reference its answers to paragraphs 1-14, as though fully set forth herein.

16. Defendant denies the allegations in paragraph 16 of the Complaint. Defendant denies that Plaintiffs are entitled to any of the relief prayed for in the Complaint.

## AFFIRMATIVE DEFENSES

## FIRST AFFIRMATIVE DEFENSE

17. As a first affirmative defense, Defendant alleges that the Complaint fails to state any claim upon which relief can be granted.

## SECOND AFFIRMATIVE DEFENSE

18. As a second affirmative defense, Defendant alleges that the Complaint fails to state any claim for violation of the Fair Labor Standards Act.

### THIRD AFFIRMATIVE DEFENSE

19. As a third affirmative defense, Defendant alleges that at all relevant times City employed persons were at all times exempt from the overtime requirements of the FLSA pursuant to 29 U.S.C. Sec. 213(a) and the regulations of the Department of Labor which implement those exemptions, 29 C.F.R. Sec. 541 et seq.

#### FOURTH AFFIRMATIVE DEFENSE

20. As a fourth affirmative defense, Defendant alleges that at all times relevant herein, it acted in good faith as that term is defined in 29 U.S.C. Sec. 260, and that such good faith precludes any award of liquidated damages.

## FIFTH AFFIRMATIVE DEFENSE

21. As a fifth affirmative defense, Defendant alleges that it is entitled to an offset to any unpaid overtime amounts for compensation paid to Plaintiffs and others similarly situated in excess of the statutory minimums, pursuant to 29 U.S.C. Sec. 207(h).

## SIXTH AFFIRMATIVE DEFENSE

22. As a sixth affirmative defense, Plaintiffs and others similarly situated are barred by the statute of limitations, 29 U.S.C. Sec. 255(a), from seeking damages more than two years prior to the filing of their lawsuit or their consent to join this lawsuit, whichever is later.

## SEVENTH AFFIRMATIVE DEFENSE

23. As a seventh affirmative defense, Defendant alleges it adopted policies and/or acted in reliance on a written interpretation of the FLSA issued by the Wage and Hour Division of the Department of Labor pursuant to 29 U.S.C. Sec. 259 and that such reliance is a defense to any claim for damages by Plaintiff or others similarly situated.

## EIGHTH AFFIRMATIVE DEFENSE

24. As an eighth affirmative defense, Defendant alleges that Plaintiffs and others similarly situated have failed to exhaust any and all applicable administrative remedies.

## NINTH AFFIRMATIVE DEFENSE

25. As a ninth affirmative defense, Defendant alleges that some or all of the allegations in the Complaint are moot.

## TENTH AFFIRMATIVE DEFENSE

2        26. As a tenth affirmative defense, Defendant alleges that Plaintiffs and others  
3 similarly situated are not entitled to an extension of the statute of limitations in that Defendant  
4 and its agents have at all times acted in good faith and with sufficient cause and within its  
5 discretion, that City and its agents have at all times complied with all applicable rules,  
6 regulations, and statutes, and that any actions or omissions were neither willful nor intentional.

## ELEVENTH AFFIRMATIVE DEFENSE

8       27. As an eleventh affirmative defense, Defendant alleges that Plaintiffs and/or others  
9 similarly situated were at all times partially exempt from the overtime requirements of the FLSA  
10 because the Defendant adopted a 207(k) work schedule for employees engaged in law  
11 enforcement activities pursuant to 29 U.S.C. § 207(k) and the regulations and interpretive  
12 bulletins of the Department of Labor.

## TWELFTH AFFIRMATIVE DEFENSE

14 28. As a twelfth affirmative defense, Defendant alleges that Defendant has provided an  
15 accord and satisfaction of the claims of Plaintiffs and others similarly situated.

## THIRTEENTH AFFIRMATIVE DEFENSE

17 29. As a thirteenth affirmative defense, Defendant alleges that Defendant has already  
18 paid any or all liability it may have had on the claims of Plaintiffs and others similarly situated.

## FOURTEENTH AFFIRMATIVE DEFENSE

20       30. As a fourteenth affirmative defense, Defendant alleges that Plaintiffs and others  
21 similarly situated have waived some or all of their claims.

## FIFTEENTH AFFIRMATIVE DEFENSE

23       31. As a fifteenth affirmative defense, Defendant alleges that Plaintiffs and others  
24 similarly situated are barred by estoppel from receiving some or all of the relief they seek.

## SIXTEENTH AFFIRMATIVE DEFENSE

32. As a sixteenth affirmative defense, Defendant alleges that the claims of Plaintiffs  
and others similarly situated are barred under the doctrines of res judicata and collateral estoppel.

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## SEVENTEENTH AFFIRMATIVE DEFENSE

33. As a seventeenth affirmative defense, Defendant alleges that Plaintiffs and others similarly situated are barred from recovery by the doctrine of unclean hands.

## EIGHTEENTH AFFIRMATIVE DEFENSE

34. As an eighteenth affirmative defense, Defendant alleges that it is not liable to Plaintiffs and others similarly situated because it paid them via the formula for fixed salary for fluctuating hours as stated in FLSA regulation 29 CFR § 778.114 and as further defined by case law.

## NINETEENTH AFFIRMATIVE DEFENSE

10       35. As a nineteenth affirmative defense, Defendant alleges that the claims of Plaintiffs  
11 and others similarly situated are barred, or any recovery should be reduced, because of their own  
12 neglect and fault in connection with the matters alleged.

## TWENTIETH AFFIRMATIVE DEFENSE

14       36. As a twentieth affirmative defense, Defendant alleges that Plaintiffs and others  
15 similarly situated are not entitled to an award of their attorneys' fees.

## TWENTY-FIRST AFFIRMATIVE DEFENSE

17       37. As a twenty-first affirmative defense, Defendant alleges that Plaintiffs and others  
18 similarly situated are barred from pursuing a class action in a FLSA case.

19 | Wherefore, Defendant prays as follows:

20                   1.       That the claim of Plaintiffs and others similarly situated for unpaid  
21 compensation plus an equal amount of liquidated damages be denied.

22                   2. That the claim of Plaintiffs for reasonable attorneys' fees, costs and  
23 interest be denied:

24 3. That Plaintiffs and others similarly situated take nothing from this action;

4. That the Defendant be awarded its costs of suit herein;

26                   5.       That the Defendant be awarded its reasonable attorneys' fees as may be  
27 determined by the Court; and

28 | //

1                   6. For such other and further relief as this Court may deem just and proper.  
2  
3 Date: August 4, 2008

4                   WILEY PRICE & RADULOVICH, LLP

5                   /s/  
6 By: \_\_\_\_\_

7                   IAN P. FELLERMAN  
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Attorneys for Defendant  
CITY OF ALAMEDA

## PROOF OF SERVICE

I am a citizen of the United States, employed in the County of Alameda, California, over the age of 18 years, and am not a party to the within-entitled action. My business address is 1301 Marina Village Parkway, Suite 310, Alameda, California 94501. On the date set forth below, I served the following document(s) by the method indicated below:

**ANSWER TO FIRST AMENDED COMPLAINT FOR VIOLATION OF  
THE FAIR LABOR STANDARDS ACT**

6  **Facsimile** by transmitting via facsimile on this date from fax number (510) 337-2811 the document(s)  
7 listed above to the fax number(s) set forth below. The transmission was completed before 5:00 p.m. and  
8 was reported complete and without error. The transmission report, which is attached to this proof of  
9 service, was properly issued by the transmitting fax machine. Service by fax was made by agreement of the  
10 parties, confirmed in writing pursuant to California Code of Civil Procedure §1013(e). The transmitting fax  
11 machine complies with California Code of Civil Procedure §1013(e).

12  **First Class Mail** by placing the document(s) listed above in a sealed envelope with postage thereon fully  
13 prepaid, in the United States mail at Alameda, California addressed as set forth below pursuant to  
14 California Code of Civil Procedure §1013(a). I am readily familiar with the business practice at Wiley  
15 Price & Radulovich, LLP for collection and processing of correspondence for mailing with the United  
16 States Postal Service. Correspondence so collected and processed is deposited with the United States  
17 Postal Service that same day in the ordinary course of business.

18  **Messenger** by placing the document(s) listed above in a sealed envelope(s) and by causing personal  
19 delivery of the envelope(s) to the person(s) at the address(es) set forth below. A signed proof of service by  
20 the process server or delivery service will be filed shortly.

21  **Personal Delivery** by personally hand delivering the document(s) listed above in a sealed envelope(s) to  
22 the person(s) at the address(es) set forth below pursuant to California Code of Civil Procedure §1011.

23  **Overnight Delivery** by placing the document(s) listed above in a sealed envelope(s) and consigning it to an  
24 express service carrier for guaranteed delivery on the next business day following the date of consignment  
25 to the address(es) set forth below pursuant to California Code of Civil Procedure §1013(c). A copy of the  
26 consignment slip is attached to this proof of service.

Alison Berry Wilkinson  
Berry Wilkinson Law Group, Inc.  
4040 Civic Center Drive, Suite 200  
San Rafael, California 94303  
Telephone: 415/259-6638  
Facsimile: 415/492-2810  
Email: Alison@berrywilkinson.com

I declare under penalty of perjury that the above is true and correct. Executed on August 4, 2008 at Alameda, California.

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Maria J. Uhl /SA